IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-88

No. ~~1838~~

S&E CONTRACTORS, INC., *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR PETITIONER

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CITATIONS

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BRIEF FOR PETITIONER

OPINIONS BELOW

The findings and opinion of the Atomic Energy Commission's Hearing Examiner, issued June 26, 1963, (R.), are reported at 2 AEC Rep. 631. The Memorandum and Order of the Atomic Energy Commission, issued November 14, 1963, (R.), granting the Contracting Officer's appeal from the Hearing Examiner's deci-

sion, are reported at 2 AEC Rep. 738 and the decision, on appeal, by the Commissioners of the Atomic Energy Commission, issued May 13, 1964, (R.), is reported at 2 AEC Rep. 850. The opinion of the Comptroller General of the United States is reported at 46 Decs. Comp. Gen. 441 (1966). The report and conclusion of law of the Commissioner of the Court of Claims (App. 18) is unreported. The opinion of the Court of Claims (App. 45) is reported in 193 Ct. Cl. 335, 433 F. 2d 1373 (1970).

JURISDICTION

The opinion and order of the Court of Claims were entered on November 30, 1970. Reconsideration was not requested. The petition for a writ of certiorari was filed on February 26, 1971 (App. 3) and was granted on May 17, 1971 (App. 3; 402 U.S. ——, 1971). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).[1]

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[1] Although the decision of the Court of Claims is not a final judgment granting or denying relief, that decision does finally determine an important right in issue, namely, the right of the Government, in the absence of fraud or overreaching, to refuse to make payment to a contractor pursuant to an administratively final disputes clause decision and, by such refusal, force the matter into the Court of Claims for reexamination there under Wunderlich Act standards.

The jurisdictional statute (28 U.S.C. 1255) does not contain any requirement of finality, nor does such a limitation appear in this Court's applicable rules, (U.S. Supp. Ct. Rules 19-23). Further, this Court's jurisdiction to review interlocutory orders of the Court of Claims that finally determine the rights of the parties to a contract on issues other than liability has been recognized by the decisions in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966) and *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424 (1966).

STATUTORY AND CONTRACT PROVISIONS INVOLVED

1. The Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act), 41 U.S.C. 321-322) provides:

> § 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. *Contract-provisions making decisions final on questions of law.*
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

2a. Section 305 of the Budget and Accounting Act of 1921, 42 Stat. 24, 31 U.S.C. § 71 (1964) provides:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

2b. Section 304 of the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964) provides:

> Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government, except that any person whose accounts may have been settled, the head of the Executive Department, or of the board, commission, or establishment not under the jurisdiction of an Executive Department, to which the account pertains, or the Comptroller General of the United States, may, within a year, obtain a revision of the said account by the Comptroller General of the United States, whose decision upon such revision shall be final and conclusive upon the Executive Branch of the Government. Nothing in this chapter shall prevent the General Accounting Office from suspending items in an account in order to obtain further evidence or explanations necessary to their settlement.
>
> The General Accounting Office shall preserve all accounts which have been finally adjusted, together with all vouchers, certificates, and related papers, until disposed of as provided by law.
>
> Disbursing officers, or the head of any executive department, or other establishment not under any of the executive departments, may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement.

2c. Section 3 of the Act of December 29, 1941, 55 Stat. 876, 31 U.S.C. § 82d. (1964) provides:

> The liability of certifying officers or employees shall be enforced in the same manner and to the

same extent as now provided by law with respect to enforcement of the liability of disbursing and other accountable officers; and they shall have the right to apply for and obtain a decision by the Comptroller General on any question of law involved in a payment on any vouchers presented to them for certification.

3a. Section 4(c), 80 Stat. 613, 28 U.S.C. § 516 (Supp. II 1964) provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

3b. Section 4(c), 80 Stat. 614, 28 U.S.C. § 519 (Supp. II 1964) provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

4. The Disputes Clause in Petitioner's contract provides:

> 6. *Disputes*
>
> (a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30

days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the Commission. The decision of the Commission or its duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This "Disputes" Clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above; Provided, that nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

QUESTIONS PRESENTED

The Court of Claims has construed the Wunderlich Act, 41 U.S.C. § 321-322, as extending to the Government a right, to the same extent as a contractor, to seek judicial review of unfavorable administrative decisions rendered by contracting agencies. The court held that the United States does not commit a breach of contract when payments due a contractor pursuant to a favorable administrative determination on fact claims litigated in accordance with the finality procedures contemplated by the standard Government contract disputes clause, are barred either by the General

Accounting Office, the Department of Justice or the head of the contracting agency, in order to force judicial review of the administrative decisions by compelling the contractor to seek his money in court. The questions presented are:

1. Whether the Court of Claims' construction of the Wunderlich Act is contrary to the meaning and purpose of that Act?

2. Whether, assuming the Wunderlich Act can be construed as extending to the Government a right to seek judicial review of an adverse administrative determination, that right may be asserted by the General Accounting Office or the Department of Justice where neither is a party to the contract, where no question of fraud or overreaching is involved and where the contracting agency itself had directed that payment be made?

3. Whether a final administrative determination entered in a contractor's favor at the conclusion of the adversary proceedings contemplated under the standard Government disputes clause may be repudiated by an agency head after specifically directing that payment be made (the case here) or where controlling procurement regulations of an agency specifically make such determinations final and binding upon the Government?

STATEMENT

1. Background

This case arises out of a competitively-bid construction contract for the building of a section of a nuclear testing facility at the National Reactor Test Station in the State of Idaho that was awarded to Petitioner,

S&E Contractors, Inc., by the United States, acting through the Atomic Energy Commission (hereinafter also referred to as AEC or Commission) on August 4, 1961. The contract was in the amount of $1,272,000 and its originally specified performance period was 180 days. (App. 4) The contract was executed on U. S. Standard Form 23 (1953 ed.) including the standard general provisions, Form 23A, with the standard adjustment clauses for "changes", "changed conditions", "time extensions, etc." and additional general provisions containing a standard "suspension of work" clause. (App. 4) Further, the contract included a modified standard "disputes" clause, (*supra,* p. 5), which provided for the resolution of "any dispute concerning a question of fact arising under this contract" by the Contracting Officer, subject to a timely appeal to the Atomic Energy Commission whose decision shall be final and conclusive "unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence."

The work was completed and the test facility was accepted by the Government on June 29, 1962, 325 days after issuance of the notice to proceed. (App. 5)

During performance of the work Petitioner submitted a number of claims to the Contracting Officer asking for equitable adjustments in contract price and time. These claims were decided by the Contracting Officer on August 8, 1962. The decision was, in general, adverse to Petitioner. Accordingly, pursuant to the contract's disputes procedures, a notice of appeal from the decision was timely filed with the AEC. Certain

additional claims, denied by the Contracting Officer on October 22, 1962, were consolidated with this appeal. (App. 1)

2. Administrative Proceedings

Nine distinct claims, seeking approximately $1,950,000, were presented to the Commission. These claims were of various types. The "Access" claim, for example, sought an equitable adjustment in contract time and money under the "Suspension of Work" clause based upon a compensable delay in site availability; the "Concrete", "Steam", "Backfill" and "Acceleration" claims sought equitable adjustments in time and money based upon extra work within the scope of the "Changes" clause and the "Weather" claim sought an extension of time based upon excusable delays within the meaning of the "Termination For Default-Damages For Delay-Time Extensions" clause. In addition, there was a claim denominated as "Miscellaneous" (which involved four minor claims for extra work under the "Changes" clause), a "Retainage" claim for money withheld from S&E by the Contracting Officer and a claim of "Impossibility" based upon an inadequate time schedule for completion of performance. (R. Hearing Examiner's Decision; 2 AEC Rep. 631, 637).

In accordance with their existing AEC contract appeal procedures, the appeal was referred to a hearing examiner designated to hear grievances arising under the disputes provision and to render decisions thereon. (App. 1) A full adversary proceeding was had in the matter which took thirteen days to complete. The examiner's understanding of the case was facilitated by a vist to the jobsite, (R. Trial Tr., Vol. 3 at 493), by a specially built model of the testing facility, which

was placed in evidence with appropriate explanatory testimony, (R. Trial Tr. Vol. 1 at 74-86), by extensive documentary support for each of the claims in issue, and by witnesses whose transcribed testimony amounted, in final form, to approximately two thousand, eight hundred pages of trial transcript. On June 26, 1963, five months after the hearing ended, the examiner's decision was issued. Eight of Petitioner's claims were sustained. (App. 6)

Thereafter, by order of the examiner, the matter was remanded to the Contracting Officer for negotiation "without delay" of a final settlement in accordance with the outlines of liability that he had determined. (R. Hearing Examiner's Decision; 2 AEC Rep. 631, 669). However, contrary to this directive, the Contracting Officer sought, and was granted, an opportunity to file out of time a petition for a full Commission review of the hearing examiner's decision. (App. 1; 2 AEC Rep. 679). On November 14, 1963, the Commission issued a memorandum and order granting, in part, the Contracting Officer's request for review and also directing the immediate payment to Petitioner of certain earned sums which the Contracting Officer had retained. (App. 1; 2 AEC Rep. 738, 744).

On May 13, 1964, a final decision was handed down by the full Commission which modified the hearing examiner's decision on one claim, reversed it on another, affirmed the remaining claims, and remanded the matter to the Contracting Officer with instructions to diligently proceed to a final settlement of Petitioner's claims. (R; 2 AEC Rep. 850, 856) With this last action by the Commission, the administrative remedies open to the contracting parties under the contract's disputes clause came to an end.

3. Intervention of the General Accounting Office

Under a letter dated March 6, 1964, a certifying officer of the AEC had sought advice from the General Accounting Office (hereinafter referred to as GAO) as to whether there could be offset from the "retainage" due Petitioner (which the Commission's order of November 14, 1963 had ordered to be paid) certain monies then owing by S&E to its suppliers, the claims for which had been assigned to the Commission. (App. 1, 2). This same letter also requested advice regarding that portion of the retainage which was said to represent damages due the Government resulting from its liability to a follow-on contractor because of a delay in site availability allegedly caused by S&E. (46 Decs. Comp. Gen. 441, 446 (1966)). In connection with this last mentioned request, it should be noted that the merits of the Government's right to withhold any sum on account of contractor-caused site delay had been conclusively settled by the hearing examiner's prior decision (he had found that S&E was not responsible for any delay in performance, R; 2 AEC Rep. 631, 668). Moreover, neither this question nor any of its subsidiary elements was then the subject of the review pending before the Atomic Energy Commission. It was, in other words, a closed question at the time the GAO was asked to render its advice.

The certifying officer's letter of March 6, 1964 had been forwarded to the GAO under cover of a letter by the General Manager, dated March 27, 1964, which stated that the advice of that office (the GAO) was sought under 31 U.S.C. § 82d.. (*supra,* p. 4). The letter specifically noted that the forwarding of this request was not to be construed as a request by the Commission for GAO review of, or concurrence in, the deci-

sion reached under the Commission's procedures for decisions on contract disputes. (46 Decs. Comp. Gen. 441, 453 (1966)).

On December 5, 1966, thirty-three months after it had received the certifying officer's request for specific advice on the treatment of an offset from the retainage items, the GAO handed down a two hundred and sixty page opinion letter (now reprinted as Opinion B-153841, 46 Decs. Comp. Gen. 441 (1966)) which treated in detail with each of the various claims, and the evidence in support thereof, that had previously been decided by the hearing examiner and the AEC in favor of Petitioner. The GAO's opinion noted that ". . . our decision will [not] be limited to the three issues raised by you . . . . Your request for decision brings into issue nearly all of the more fundamental questions decided by the Hearing Examiner, but even if it did not, our responsibility under law would not be discharged were we to ignore a questionable claim allowance once brought to our attention." (46 Decs. Comp. Gen. 441, 460 (1966)).

Based upon its *ex parte* review of the evidence, the GAO concluded that "the decision rendered by the Hearing Examiner on June 26, 1953, as reviewed by the Commission, fails to meet the requirements of the Wunderlich Act on material questions of fact and is erroneous on several material questions of law . . . ." (46 Decs. Comp. Gen. at 544) The GAO advised the Commission that S&E Contractors, Inc. had no valid claim against the Government, and on March 27, 1967, Petitioner was informed by the Commission that it would take no action in connection with the claims it had previously recognized which was inconsistent with

the views that had been expressed by the General Accounting Office. (App. 10) Jurisdiction to intervene in the contractual disputes process as well as in any other administrative determinations was claimed by the GAO to have been "clearly conferred by the basic settlement and audit authority granted by the Budget and Accounting Act, 1921." (46 Decs. Comp. Gen. at 454)

4. Proceedings in the Court of Claims

Petitioner brought suit in the Court of Claims on April 11, 1967, pursuant to 28 U.S.C. § 1491. (App. 4) On September 29, 1969, the Commissioner of that court submitted a report recommending the allowance of S&E's motion for summary judgment based on the theory that the Commission's failure to have made payment to Petitioner in accordance with the entitlement established by the disputes clause proceedings was a breach of contract. (App. 18) In support of this result, the Commissioner relied on the language of the contract's disputes clause and the statement made by this Court in *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966) that respect should be accorded the parties' rights to contract and to provide for their own remedies. The GAO's actions in the matter were deemed by the Commissioner to have been in excess of its authority.

In subsequent proceedings before the Court of Claims, the Government took the position that the question of the GAO's authority was totally irrelevant to any issue in the case. (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4, 5) The only matter for consideration—from the

Government's point of view—was its right to judicial review of administrative adjudica[illegible] subject to the terms of the Wunderlich Act. And this right to seek such review was said to be a matter which the Department of Justice was free to decide for itself, independent of any prior GAO action, and notwithstanding any contractual commitment on the part of an executive agency to honor the finality of its decisions under the standard Government contract disputes clause. (R. Defendant's Reply To Plaintiff's Response To Defendant's Request for Review of the Commissioner's Recommended Opinion at 6)

An amicus curiae brief was filed by the GAO setting forth that office's views with respect to its jurisdiction to intercede in the contract disputes process. Its position was that the power exercised by it in this case derived from its authority to audit and settle the accounts of executive officers. This it described as an executive function in the performance of which it was acting as a member of the executive branch. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 28) The point was made, too, that action of the type it had taken in this case was fully anticipated and intended by the Congress when it passed the Wunderlich Act. The GAO agreed, however, with the position taken by the Department of Justice, namely, that the question of the authority exercised by the GAO in this matter was totally irrelevant. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 3).

On November 30, 1970, the Court of Claims, by a 4-3 decision, upheld the Government's right to seek judicial review, based upon Wunderlich Act standards, of

the contract disputes decision favorable to Petitioner. (App. 45) The court's majority was of the view that it made no difference whether the failure to pay a contractor resulted from a threat of the General Accounting Office to charge a certifying officer's account, (as occurred in this case), or "from a change of heart"[2] in the contracting agency itself. In either event, the Government was entitled to withhold payment and thereby force judicial review of the final disputes decision. (App. 49)

The dissenting opinion of Judge Skelton, with which Chief Judge Cowen and Judge Collins concurred, (App. 61) stressed the fact that, where as here, there had been no disavowal by the contracting agency of its own final disputes decision, the Department of Justice could not, on its own initiative, seek review of a settled contract matter. And, as to whether a contracting agency could, in fact, seek review of its own administrative decision—have "a change of heart" as the majority put it—Judge Skelton felt that was a point not to be answered until the issue was squarely presented. With respect to the authority exercised by the General Accounting Office in this case, Judge Skelton, as well as Judge Collins in his separate dissenting opinion, (App. 83) disagreed with the majority's acceptance of the role played by the GAO. To all of the dissenters, the GAO's actions reached beyond that office's historically recognized statutory limits.

As a consequence of the Government's delay in payment in this case, the Petitioner has been unable to continue in business.

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[2] This language is the court's own. The opinion below leaves open by whom, in the agency, the "change of heart" may be brought about.

ARGUMENT

SUMMARY AND INTRODUCTION

Disputes clauses are provisions common to all Government contracts. They are, in essence, adjudicatory clauses pursuant to which the Government, as a contracting party, reserves unto itself a power—to be exercised by its own Contracting Officers and the heads of the various procuring agencies (or their designated representatives, the Boards of Contract Appeals)—to unilaterally determine the merits of a dispute between itself and its contractors.

The disputes clause operates in conjunction with other standard Government contract clauses (the so-called equitable adjustment or contingency clauses) which provide for equitable adjustments in contract price and performance time for such factors as Government-ordered changes, changed conditions, work delays and other contract-specified contingencies that may form the basis for a contractor's claim. It is the expeditious resolution of these claims which represents the chief purpose of the disputes process.

To the contractor, this process extends a promise to be paid promptly by the Government either for additional work it may have caused him to finance and perform or for costs arising out of unforeseen problems the contractual responsibility for which has been assumed by the Government. In return for this consideration, the contractor relinquishes his right to stop work or to refuse additional work and, instead, he promises to continue diligently with performance in accordance with a Contracting Officer's directions pending the resolution of a contract dispute. To the Government the disputes process insures uninterrupted

performance of the contract work, (either in accordance with a Contracting Officer's interpretation of that work or his specific changes thereto) and provides the means of quickly settling contract disagreements without expensive and burdensome litigation.

The practice under disputes proceedings long ago effectively established that, except as further pursued by a contractor, decisions rendered by the Government in a contractor's favor were final and conclusive. This is a case where that settled practice was brought to an end.

In a sharply divided opinion, overruling its own Commissioner, the court below held that an administrative disputes decision, rendered in a contractor's favor at the conclusion of the adversary proceedings contemplated under a standard Government disputes clause and accepted as final by the contracting agency itself, could later (a) be barred from payment on the basis of an unsolicited *ex parte* evaluation and challenge to that decision introduced by the General Accounting Office—one not a party to the contract, (b) be relitigated by the Department of Justice on the basis of its own independent examination of the decision without regard to any position earlier taken by the General Accounting Office or the procuring agency itself, and (c) be disavowed by the procuring agency that rendered the decision even though it had committed itself by express contract language and supporting regulation to honor with finality its own disputes decision.

According to the court below, it makes no difference whatsoever what precipitating events may have led or forced a contractor to seek payment on his favorable

administrative decision in the Court of Claims, "When a Wunderlich Act case is pending here", said the court, "'the only question is how much finality attaches to the findings and holdings of the Board set up to execute the powers of the head of the agency in the premises.'" (App. 49) In short, the Government's failure to implement, by payment, a final disputes decision in a contractor's favor was held not to constitute a breach of contract—at least not until the court itself has independently reexamined the bases of the administrative decisions in light of the review criteria set forth in the Wunderlich Act, (*Supra*, p. 3) by having the contractor prove his case again.

No decision of any court has ever more seriously imperiled the viability of the disputes process or placed upon federal contractors greater uncertainties and hazards in the conduct of their business than the decision below. Judge Collins' trenchant remark put the situation well: "After today's decision the Government would be foolish to pay *any* board awards." (Dissenting Op., Collins, J., App. 95) We are convinced that the court's decision, if it is allowed to stand, will impose a needless and unwarranted burden upon administrative and judicial machinery, will encourage protracted litigation at the expense of successful contractors, and, because the court's decision robs the disputes process of its reasons for being, it will ultimately bring that mechanism to an end. We are equally convinced that the court's decision was wrong. In brief, our reasons are:

First: Contrary to the Court of Claims' conclusion, the framers of the Wunderlich Act never contemplated that the Government should be granted a power—to be exercised either through the GAO or through any other

Governmental arm—to avail itself of the finality standards of that Act in order to obtain a "substantial evidence" review of a final administrative decision rendered in a contractor's favor by a procuring agency itself. Clearly, the text of the Wunderlich Act does not sanction such a result and its legislative history most affirmatively rejects such a conclusion. The Wunderlich Act was intended for one purpose only: To restore to aggrieved contractors their right to secure judicial review of an adverse disputes clause determination on grounds more expansive than fraud. The Act was a command to the Government not to plead the disputes clause as limiting judicial review only to cases where fraud was involved.

Second: Regardless of what conclusion one might draw in regard to the meaning and purpose of the Wunderlich Act, the fact remains that that Act was in no sense a jurisdictional statute. It added no powers either to the GAO or the Department of Justice. Nor does that Act prohibit contracting agencies from writing "fact" disputes clauses. The Act was intended to, and does no more than, prescribe a rule of law with respect to the degree of finality that should attach to administrative determinations made on a contractor's claim in the course of the standard disputes procedures contemplated under Government contracts. There is nothing in that Act that could even remotely be construed as sanctioning a departure from the principle which this Court has always adhered to, namely, that the integrity of an agreement drawn between parties competent to contract, and decisions made under them, cannot be undermined by those who are not parties to such an agreement. Yet it is the violation of precisely this principle which the Court of Claims con-

doned by tolerating the GAO's usurpation of the contracting agency's decision-making function and by permitting the Department of Justice to relitigate the contractor's claims on the basis of that department's own independent views of the matter notwithstanding the contrary views of the procuring agency itself.

Third: Neither on facts of this case nor under the presently controlling procurement regulations is there any basis to support the court's statement that, where a contracting agency has committed itself to honor with finality a determination it has made in favor of a contractor, it may thereafter disavow its own decision through the simple expedient of what the court called "a change of heart in the agency itself." (App. 49).

The AEC never repudiated its own decision in this case. In fact, it was the full Commission itself that rendered the decision that is in question now. But these particular facts aside, the point is that it makes no difference whatsoever whether the administrative decision in the contractor's favor emanates from the agency head or from an authorized representative thereof. What matters, in either event, is that by contract language and by supporting regulations, the decision so rendered is final and binding upon the Government. In short, having fully committed itself to finality, the agency can have no change of heart.

I

THE TEXT AND LEGISLATIVE HISTORY OF THE WUNDERLICH ACT REJECT THE CONCLUSION OF THE COURT OF CLAIMS THAT CONGRESS INTENDED THAT ACT TO BE USED AS A BASIS FOR INVITING COLLATERAL ATTACK UPON FINAL ADMINISTRATIVE DECISIONS FAVORABLE TO A CONTRACTOR

At the heart of the controversy in this case is the meaning and purpose of the Act of May 11, 1954, 68 Stat. 81 (The Wunderlich Act) 41 U.S.C. 321-322, which provides:

> § 321. *Limitation on pleading contract-provisions relating to finality; standards of review.*
>
> No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fradulent (sic) or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> § 322. *Contract-provisions making decisions final on questions of law.*
>
> No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board.

In the decision below, this Act was held to confer upon the Government, as a contracting party, the right to obtain judicial review of an administrative disputes

decision coextensive with that traditionally allowed to the contractor under the terms of that law. The holding was based on two grounds. First, the court's reading of the statute: "Strictly read the Act favors neither Government nor contractor: judicial review . . . seems extended equally and under like conditions to both contracting parties." (App. 50) Second, its reading of the legislative history: That history "albeit not explicitly, in general supports this construction [of coextensive rights of review]". (App. 50) We cannot agree with either conclusion.

Though the Act is hardly a model of clarity, even a "strict" construction of that statute could not lead one to ignore the strained interpretation that results when that Act is read as granting to *each* of two *contracting* parties the right to seek judicial review on a decision rendered by one of them on a dispute arising under the contract.

Such a result was never intended. The Wunderlich Act was meant to and does address itself to one situation only, i.e., appeals by contractors from adverse disputes decisions, and this is evident when the Act is viewed in its setting.

In this connection we would point out, as a preliminary matter, that, while the Court of Claims purported to look to the relevant legislative history to reinforce its conclusion, its approach to that history was deficient in one vital aspect. The court failed to give any consideration (at least its opinion reflects none) to the most pervasive theme in that legislative history—the struggle to achieve an accommodation between two competing interests: the Comptroller General's need to have some voice in contract matters and the need of con-

tractors and procuring agencies to be able to render disputes determinations free from any further Governmental second-guessing.

The Court of Claims' review of the legislative history led it to the conviction "that Congress through the Hearings received a presentation emphasizing more the need for courts of competent jurisdiction to be open to both parties". (App. 53) But this is quite beside the point. Indeed, it is a conclusion disputed by no one. The real question, in fact the only question, is how and to what extent this needed access to the courts was meant to be distributed and balanced between the competing interests that were represented in the Wunderlich hearings.

We are convinced that when full consideration is given to the basic purposes of the Act, the various legislative drafts that were submitted, the near universal opposition to permitting the GAO a voice in disputes proceedings, the clear and affirmative heed to that opposition manifested by Congress through responsive changes in the proposed legislation, the strong disclaimers by GAO and Congress of any intent to expand that office's authority, the retention of the words "judicial review" in the final legislation and perhaps most important of all, the contractor's compelling need for finality in disputes matters—then, upon the weighing of all these factors, the decision below cannot be allowed to stand.

A. THE WUNDERLICH ACT: BACKGROUND AND LEGISLATIVE HISTORY

In *United States* v. *Moorman,* 338 U.S. 457 (1950) this Court upheld the validity of an "all" dispute clause, i.e., a clause which authorized a Contracting

Officer to make decisions both on questions of fact as well as law. One year later, in *United States* v. *Wunderlich,* 342 U.S. 98 (1951), it was held that decisions of Government officers on contractor claims rendered under the authorization of a Government "facts" disputes clause were final and binding absent fraud on the part of such officers. The direct effect of these two decisions—which, in combination, granted nearly absolute finality to all administrative disputes determinations—was to bring to an end the practice that had developed in the Court of Claims of granting contractors the benefit of a judicial review of adverse administrative determinations under such various criteria as arbitrariness, bad faith and lack of substantial supporting evidence. See, e.g., *Needles* v. *United States,* 101 Ct. Cl. 535, 604 (1944) and *Bein* v. *United States,* 101 Ct. Cl. 144, 167 (1943).

1. Activity in the 82d Congress: Proposed Legislation Modified To Include GAO

In its opinion in *United States* v. *Wunderlich, supra,* this Court suggested that, "If the standard of fraud that we adhere to is too limited, that is a matter for Congress." (342 U.S. at 100) Indeed, reaction to the *Wunderlich* decision was immediate and remedial legislation—urged by federal contractors as well as by Government officials—was introduced in both Houses during the 82d Congress to overcome the effect of the decision and to restore to contractors their access to the courts. These bills, H.R. 6214, H.R. 6301, H.R. 6338, H.R. 6404, S. 2432, and S. 2487, though variously worded, had two common elements: While all spoke in terms of *judicial* review of administrative decisions none mentioned a right of review in behalf of the Government.

The General Accounting Office raised immediate objection to this legislative "omission". In the Senate hearings held on S. 2487, the Assistant Comptroller General said:[3]

> S. 2487, as introduced, is considered by the General Accounting Office as inadequate and is objectionable because no provision is made therein for a review of decisions of administrative officers by the Government, through the General Accounting Office. Without a provision to that effect, the General Accounting Office in performing its statutory functious (sic) placed upon it would be precluded from questioning the propriety or legality of payments made to a contractor as the result of an arbitrary or grossly erroneous decision on the part of the contracting officer.
>
> Furthermore, it is the view of the General Accounting Office that the bill should contain language prohibiting the executive contracting agencies from including a clause in a contract purporting to make the decision of the administrative officers final and conclusive on questions of law.
>
> In lieu of the pending bill S. 2487, it is urgently recommended that there be enacted a bill providing substantially as follows:
>
> No Government contract shall contain a provision making final on a question of law the decision of an administrative official, representative or board. Any stipulation in a Government contract to the effect that disputed questions shall be finally determined by an administrative official, representative or board shall not be treated as binding if the General Accounting Office or a court finds that the action of such officer, repre-

[3] *Hearings Before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess. 10 (1952).

> sentative, or board is fraudulent, arbitrary, capricious, grossly erroneous, or that it is not supported by substantial evidence.

The views expressed by the Assistant Comptroller General were, in general, endorsed by O. R. McGuire, a former counsel to the Comptroller General.[4] However, in the testimony of this important witness, there is foreshadowed the outlines of the present dispute, namely, the GAO's authority and understood practice as it related to questions of fact and law underlying contract payments. The witness said:

> The imposition of a second or third administrative review by another Government agency, such as the General Accounting Office, on the facts would only worsen present conditions.
>
> Though I do believe that the Comptroller General should continue to have the authority which he has exercised before the Wunderlich case of reviewing the contract payments under the law.

When asked whether he had studied the draft proposal earlier submitted by the Assistant Comptroller General (quoted above), the former GAO counsel answered:

> No, I have not studied that particular draft, but I have been familiar with the arguments for many years. In fact, I have made some of the arguments up here on behalf of the General Accounting Office to the Congress. And I believe that the review should be limited of the General Accounting Office on these particular kinds of questions, to questions of law, because the General Accounting Office has even less organization than the head of the Department to make de novo an investigation of the facts.

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[4] *Id.* at 41.

> He must, and does, rely upon the facts and for the doing by the administrative officers concerned, whose actions are unquestioned and unchallenged by the contractor.
>
> But I think the Comptroller General can take care of any situation from an audit standpoint, or from the standpoint of settling claims for that matter, if he will accept the facts, unless, of course, there is fraud, or just gross mistake that is reported to him by the administrative officer.
>
> There is no need to duplicate that.

And, on the same point, he added:

> But I do not believe he should review the facts and I do not believe that he claims that his office should review the facts.

In response to the urgings of the Comptroller General's office, S. 2487 was amended so as to preclude finality from attaching to any disputes decision "which the General Accounting Office or a court, having jurisdiction, finds fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative and substantial evidence." (For the full text of this bill, see 98 Cong. Rec. 9059, July 3, 1952) The Senate passed the amended bill S. 2487 but the House did not act upon it during that session of Congress.

2. Activity in the 83d Congress: Opposition To Including GAO in Bill; Compromise Adopted

In the 83d Congress, new legislation was introduced. Two of these bills, S. 24 and H.R. 1839, contained language identical to that which had appeared in the amended bill, S. 2487. These new bills, in other words, expressly recognized a right on the part of the Govern-

ment (acting through the General Accounting Office) to invalidate disputes decisions on precisely the same review grounds that a contractor would be entitled to invoke in his own behalf before the courts.

In the House hearings that followed,[5] the opposition to the sanctioning of such authority in the General Accounting Office was virtually unanimous. Government and industry alike spoke against the proposal. Their objections went to one point: Inclusion of the Comptroller General in the wording of the legislation was not only unnecessary but also totally at odds with the purposes of the disputes process. It would create uncertainty and delay, impair contractors' bonding and banking capabilities, encourage protracted litigation and destroy the finality which existed under the disputes procedures. A sampling of the witnesses' comments follows:

> In agreeing to the usual disputes clause a contractor with the Department of Defense has permitted the other party to the contract to be the arbiter of all disputed questions of fact. The Government has recognized its responsibilities in this regard, and the Armed Services Board of Contract Appeals is an excellent and impartial body of a judicial character. But, having surrendered such rights of decision, it is hardly fair or just to ask a contractor also to submit to second guessing by a second and unrelated Government agency such as the General Accounting Office. The placing of any other governmental administrative agency in such a position would have equally unfortunate results. Such double administrative review is wholly unnecessary and wholly unfair to the contractor. This point alone justifies completely our position

[5] *Hearings Before Subcommittee No. 1 of the House Committee on the Judiciary*, 83d Cong., 1st & 2d Sess. (1953, 1954).

that this bill should not be enacted in its present form. (Statement of Frederick E. Hines, On Behalf of Aircraft Industries Association of America, *House Hearings* at 93)

The bill, H.R. 1839, [identical in wording to S. 24] adds an additional factor which would complicate the efforts of the Department of Defense and other executive agencies in obtaining the maximum degree of finality under its contracts. That is the provision which would apparently permit the General Accounting Office to render the disputes clause in any contract void, by making a finding to the effect that an administrative decision was "fraudulent, grossly erroneous, so mistaken as necessarily to imply bad faith, or not supported by reliable, probative, and substantial evidence." The General Accounting Office has, of course, general authority to review fiscal transactions of Government agencies, including contractual obligations and disbursements thereunder. However, in cases in which the contract contains a disputes clause and that clause has been utilized to secure a final administrative determination of fact, no further review by other agencies is required.

* * *

To superimpose General Accounting Office review on existing disputes clause procedures would not only create a completely new review, it would, as a practical matter, eliminate the usefulness of the disputes clauses themselves by destroying the concept of finality and dividing the responsibility for determining the merits of any given appeal. Undoubtedly, this would generate protracted and expensive disagreements among Government agencies, the General Accounting Office and contractors' representatives. This would defeat the aims of both the Government and its contractors by making it impossible to accomplish the very purposes of the disputes clause; i.e., the achievement of proper and expeditious performance of contracts. (Letter of Roger Kent, General Counsel, Department of

Defense, to Chairman of the House Committee on the Judiciary, *House Hearings* at 132)

Third, on the question of the General Accounting Office, it is my understanding that the General Accounting Office considers that it should have the same authority which it had pursuant to law before the decision in the Moorman and Wunderlich cases.

Accordingly, it is unnecessary specifically to mention the General Accounting Office in the proposed legislation, to accomplish this. Further, specifically to mention that Office might imply a new type of review of the finality of administrative decisions which conceivably could cause difficulty for contractors, particularly as far as the bankability of their contracts are concerned. (Statement of Leonard Niederlehner, Deputy General Counsel, Department of Defense, *House Hearings* at 54)

The alleged purpose of the bill originally was to counteract the effect of the Wunderlich case which reversed the Court of Claims and in effect held that the disputes clause precluded judicial review. S. 24, however, is cloudy as to intent and recognizes the jurisdiction of the General Accounting Office which has not previously been concerned with the disputes clause and which would only add confusion to an already complicated matter. (Statement of California Manufacturers Association, *House Hearings* at 22)

. . . the Federation urges that the bill be amended so as to delete the provision permitting review by the General Accounting Office of decisions of administrative officials. The effect of the provision is to set up the General Accounting Office as a "court of claims." It is unnecessary to point out that an agency of the legislative branch of the Government should not be used to perform functions intended for the judicial branch. (Statement

of National Federation of American Shipping, Inc., *House Hearings* at 26)

Like some of those who have spoken before me, I am disturbed by the mention of the General Accounting Office in the Senate bill. It is also mentioned in H.R. 1839. I think it has no place here. I get reassurance from the Senate report, which states that this language is not intended to add or subtract from the present jurisdiction of the GAO in any way. As you know, the precise extent and limits of the Comptroller General's jurisdiction is presently a matter of great concern and open dispute. I do not think that that involved question should be injected here. It would only lead to confusion and would divert attention from the prime purposes of this remedial legislation to afford legislative relief from the unfortunate effects of the Wunderlich decision. (Statement of Robert E. Kline, Jr., Representing the National Association of River and Harbor Contractors, *House Hearings* at 103)

The language of S. 24 apparently establishes the General Accounting Office as an additional administrative agency for the review of disputes under Government contracts. This innovation would have a serious impact on existing procedures for arbitrating such disputes and giving the requisite degree of finality to decisions thereunder. Over the years the contracting agencies of the Government with which the electronics industry does almost all of its business, namely, the Department of Defense, the Atomic Energy Commission, and the GSA, have developed efficient and workable systems for arbitrating disputes and reaching decisions on questions of fact. Procedures have been devised for insuring that contractors are given a fair and impartial review of adverse decisions by contracting officers. Boards of contract appeal have been established, such as the Armed Services Board of Contract Appeals and the boards of some

of the civilian agencies. Clear and effective procedures have been devised for appealing decisions of these boards under certain conditions to the courts. Under S. 24, however, the scope and powers of the General Accounting Office are vastly enlarged, and this agency of the Government, which has heretofore exercised principally investigatory and audit functions, becomes clothed with powers of a judicial nature. S. 24 appears to set up the General Accounting Office as a third administrative tier of review in Government contract disputes.

* * *

One thing especially seems clear, and that is that the finality now afforded the decisions by Government boards of contract appeals, and in particular the Armed Services Board of Contract Appeals, would be utterly nullified by the establishment of a new administrative agency of review, and the usefulness of these boards would come to a quick end. The Department of Defense in its testimony has corroborated our prediction in this regard. (Statement of Charles Maechling, Jr., Representing the Radio-Electronics-Television Manufacturers Association, *House Hearings* at 105, 106)

Turning now to the McCarran bill, [meaning the amended S. 2487 which contained wording identical to the later S. 24] my first reaction is that, while it purports to favor the private contractor, it operates like a boomerang in that it undermines the security and bankable quality of Government contracts by permitting the General Accounting Office for the first time in history to reverse a contracting officer's decision favorable to the contractor within the 3-year statute of limitations on grounds other than fraud or gross mistake implying bad faith.

Obviously, the Comptroller General, as watchdog of the Treasury, has a legitimate concern about the recent application of the Wunderlich fraud test

against the Government. (See *Leeds & Northrup Co.* v. *U. S.*, 101 F.Supp. 999 (E.D. Pa. 1951).) The General Accounting Office clause in the McCarran bill, however, would do much more than restore the pre-Wunderlich rule; it would set up the General Accounting Office as a second Court of Claims with power to reverse a favorable contracting officer's decision if it decided that there were no substantial evidence to support it. Private contractors, surety companies writing performance and payment bonds, and banks financing long-term contracts have reason to be afraid of the repercussions of this provision. (Statement of Franklin M. Schultz, Attorney at Law, Washington, D. C., *House Hearings* at 116)

The universal opposition to the GAO's inclusion in the proposed legislation (i.e., S. 24), and the impasse between that office and the Department of Defense, see, 99 Cong. Rec. 4598 (1953) (remarks of Senator McCarran), caused the Comptroller General to offer a substitute measure—one which deleted all reference to his office. (Letter dated December 30, 1953, from the Comptroller General to the Chairman, House Committee on the Judiciary, *House Hearings,* at 34, 135-137). Except for the words "in any suit now filed or to be filed" this "substitute" bill—which was patterned closely after S. 2487, the bill first introduced by Senator McCarran during the 82d Congress—constitutes the present language of the Wunderlich Act.

In submitting the substitute bill for consideration and in recommending its passage, the Comptroller General said: "In my judgment this substitute language will accomplish what we have been striving for all along and will place the General Accounting Office in precisely the same situation it was in before the

decisions in the Wunderlich and Moorman cases." (*House Hearings,* at 136)

And industry, in also endorsing this substitute bill, said:

> It is still possible that the substitute bill might be interpreted, contrary to the statement in the prior committee reports, to enlarge the jurisdiction of the General Accounting Office with respect to decisions by heads of departments or appellate boards. But since the substitute bill, unlike H.R. 1839, H.R. 6946, and H.R. 3634, does not apply to initial decisions by contracting officers, it can have no effect upon the status of the General Accounting Office. I might point out that this substitute provision does follow in this respect the language and scope of the amended disputes clause of the Department of Defense referred to in prior testimony on behalf of the Department. (Statement of Frederick E. Hines, On Behalf Of Aircraft Industries Association of America, *House Hearings* at 93)

> In our view, the adoption of this language will rectify the unfortunate situation created by the Wunderlich decision, without disrupting finality of settlement and without disrupting the present appellate procedures provided by the Government boards of contract appeals. (Statement of Charles Maechling, Jr., Representing the Radio-Electronics-Television Manufacturers Association, *House Hearings* at 106)

> . . . the American Merchant Marine Institute finds no objection either to the substitute bill suggested by the Comptroller General of the United States in his letter to the chairman of this committee dated December 30, 1953, and as to which Mr. Lyle Fisher testified yesterday. That substitute, which I understand to be the product of joint

industry-Government consultation, does not vest the General Accounting Office with authority to set aside administrative decisions of questions of fact arising under a Government contract. (Statement of Francis T. Greene, Executive Vice President, American Merchant Marine Institute, Inc., *House Hearings* at 122)

Insofar as the Department of Defense was concerned, it too joined in supporting the substitute bill. That Department's opposition to the predecessor bill, S. 24, had been based on two main points: First, S. 24 was seen by the Department of Defense as expanding the role of the GAO from a then restricted right of review limited to questions of law only, to a right of review that would encompass both questions of law and fact. Second, this expanded right of GAO review was regarded by the Department of Defense as imposing hardship—both upon the Government as well as private industry—in that years would elapse before an administrative decision on a contract matter could reach finality. It was with a view to overcoming these objections that the Department of Defense had, at one point, drafted an amendment to S. 24 which stated that decisions on "disputes involving questions of fact . . . shall be binding except as [they] may be determined by a court of competent jurisdiction to have been arbitrary, so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." (For the full text of the amendment and the views of the Department of Defense objecting to S. 24, see 99 Cong. Rec. 4598 (May 6, 1953)).

That these objections were removed by the substitute bill is evident from the Comptroller General's

letter of December 30, 1953 advising that: " . . . representatives of interested administrative agencies have indicated to us that . . . there would be little or no opposition to the particular language of the substitute draft." *House Hearings* at 136.

On this state of the legislative record, it seems incredible that the General Accounting Office could have concluded, as it did in this case, that " . . . Congress, when it was considering the Wunderlich Act, expressly recognized the jurisdiction of the General Accounting Office to review Disputes clause decisions on questions of fact and law . . . . " 46 Decs. Comp. Gen. 441, 455 (1966) Nonetheless, it was on the basis of that conclusion that the GAO here undertook an *ex parte* review of the administrative disputes decision earlier made in Petitioner's favor and rewrote that determination to accord with its own view of the controverted facts and the law it deemed applicable thereto.

When suit was brought in the Court of Claims, the Department of Justice sidestepped the issue posed by the GAO's intervention in the disputes process by saying that that question "is totally irrelevant to any issue in the present case" (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4) and the Court of Claims met the point by stating that " . . . the Comptroller's powers of decision and settlement, though great, may be assumed to lapse and fail at the Court House door." (App. 48)

Quite obviously the Comptroller General's intervention in this case was not an irrelevant factor nor, as a practical matter, could it be said that his powers of

decision and settlement lapsed at the Court House door. It was the actions of the Comptroller General that precipitated this suit in the first instance and only by treating those actions (and the indirect support later given them by the Department of Justice) as being within the contemplation of the Wunderlich Act, could the Court of Claims have concluded, as it did, that the failure to pay Petitioner was not a breach of contract.

B. THE ISSUE POSED BY THE LEGISLATIVE HISTORY

The problem of statutory interpretation raised in this case turns on one point only: the meaning and effect to be given to the Comptroller General's statement—included in the committee report that accompanied the final bill—that the substitute language (i.e., the later Wunderlich Act) would place the General Accounting Office "in precisely the same situation it was in before the decision in the Wunderlich and Moorman cases." (*House Hearings* at 136; H.R. Rep. No. 1380, 83d Cong., 2d Sess. 6 (1954))

Today the Comptroller General claims that by this statement it was intended (and understood) that there should be "restored" to the General Accounting Office its right under the Budget and Accounting Act of 1921, 42 Stat. 24, as amended, 31 U.S.C. § 74 (1964), (*supra*, p. 4), to review disputes decisions in the same manner as the courts, save only that that office could not conclusively determine the rights of the parties to the contract. 46 Decs. Comp. Gen. 441, 454 (1966)

This contention cannot stand. It proceeds upon an erroneous view of the law existing prior to the decisions

in *Moorman* and *Wunderlich* and, further, it seriously distorts the Wunderlich Act and its legislative history.

The decisional law prevailing in the lower courts prior to the *Moorman* and *Wunderlich* decisions stood uniform on the point that, in the absence of fraud or overreaching, the Comptroller General was without authority to contest facts administratively resolved where the contract itself vested the final power of determination in the executive agency. The cases that have so held are numerous. See, e.g., *Consolidated Vultee Aircraft Corp.* v. *United States,* 97 F.Supp. 948 (D. Del. 1951); *John H. Mathis* v. *United States,* 79 F. Supp. 703, 708 (D. N.J. 1948); *McShain Co., Inc.* v. *United States,* 83 Ct.Cl. 405, 409-10 (1936); *Albina Marine Iron Works, Inc.* v. *United States,* 79 Ct.Cl. 714, 719-20 (1934); *Penn Bridge Co.* v. *United States,* 59 Ct.Cl. 892, 896-98 (1924). One could not possibly conclude from these representative cases that the GAO ever had a statutory right to intervene in the disputes process. At most, the cases support only the fact that the Comptroller General often made *attempts* to usurp the executive agency's prerogative to decide contract disputes, but such could hardly lend support to a claim that the power he sought to assert was ever lawfully vested in his office in the first place.

Nor has this Court ever declared a contrary rule concerning the Comptroller General's authority. Whether finality of an executive determination on a claim against the United States was based upon explicit contract language, as was the situation in *United States* v. *Mason & Hanger Co.,* 260 U.S. 323 (1922) or whether such finality derived from a law that vested fact-finding authority in a particular executive agency,

as was the case in *Wright* v. *Ynchausti & Co.*, 272 U.S. 640 (1922),[6] the result, in either event, as these cases plainly show, was to put the agency's factual determination on the merits beyond the reach of the Comptroller's office. The same point has been made by the Attorney General. See 37 Ops. Att'y Gen. 95 (1933); 34 Ops. Att'y Gen. 162 (1924).

We know of no decision arising prior to the *Moorman* and *Wunderlich* cases that ever recognized a right in the GAO to reexamine the merits of a contract claim whose factual aspects had previously been administratively resolved. Nor does the Comptroller General's opinion cite any such case. It relies instead upon the

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[6] *Wright* v. *Ynchausti & Co.*, 272 U.S. 640 (1922) involved a controversy between Wright, the Insular Auditor of the Philippine Islands (whose functions were substantially the same as those performed by the Comptroller General in the United States) and Ynchausti & Co., steamship operators, concerning payment of a customs duty in accordance with a refund determination earlier made in the company's favor by the Collector of Customs. The Insular Auditor refused to countersign the payment warrant, contending that he had a right to determine the merits of the refund question. This Court held that the Auditor had no power to review the findings of the Collector and to form his own judgment on the matter when determination of the questions involved was within the exclusive province of another agency. It said:

"... where the Insular Auditor is not vested with administrative discretion to pass upon the merits of the claim for which the warrant is drawn, his only function is to determine whether the warrant is drawn by the proper officer upon the decision of the proper tribunal, and is applicable to an existing appropriation, and having been satisfied as to these preliminaries, his duty is merely ministerial ....

We may add that such a conclusion is quite in keeping with the functions of the auditors of the treasury and the Comptroller of the Treasury of the United States, a comparison which is constantly used in the Philippine statutes." (272 U.S. 651, 652)

more general proposition—declared in *Charles* v. *United States,* 19 Ct.Cl. 316, 319 (1884) and *Longwill* v. *United States,* 17 Ct.Cl. 288, 291 (1881) that claims of a doubtful nature may be rejected by the Comptroller's Office, thereby leaving the claimants free to seek a remedy in court. 46 Decs. Comp. Gen. at 459 (1966).

That this is true as a general proposition we do not question. The point is, however, that it has no application in cases such as this one, where the subject matter of the claim falls outside of the Comptroller's discretionary authority and rests, instead, within the competence of another department. Much more in point is what this Court said in *United States* v. *Jones,* 59 U.S. (18 How.) 92, 95 (1856), on the question whether the accounting officers could contest the legality of a disbursement that had been made by the Secretary of the Navy.

> The Secretary of the Navy represents the President, and exercises his power on the subjects confided to his Department. He is responsible to the people and the law for any abuse of the powers intrusted to him. His acts and decisions, on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officer of another department to make them valid and conclusive. The accounting officers of the Treasury have not the burden of responsibility cast upon them of revising the judgments, correcting the supposed mistakes, or annulling the orders of the heads of departments.

Thus, when the Comptroller General based his endorsement of the bill which later became the Wunderlich Act on the ground that it would restore his office to the position it earlier held, we cannot comprehend

how this endorsement could now be extended to embrace more than cases of fraud or overreaching.

But if more than this was intended then it was certainly not so understood by those representatives of Government and industry who joined in endorsing the substitute bill. The Comptroller General's present position on the meaning of the Wunderlich legislation undercuts the very reason for the enactment of a compromise bill. There would simply have been no point in objecting to the GAO's being named in the proposed legislation in the first place if it were thought that that office would be allowed to impede the finality of a disputes decision whether or not the GAO were named in the legislation itself. The Comptroller General's position reduces the compromise underlying the legislation to a mere agreement on form, devoid of substantive connotations, and that most assuredly was not what the opposition to the GAO was all about, nor what was intended by the passage of the Act in its final form.

To overcome this sticking point, the GAO has sought to cast the opposition expressed against it during the Wunderlich hearings as an opposition based on the fear that expressly naming that office in the bill would make the GAO another Court of Claims with judicial power to render decisions binding on both parties to the dispute. (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 41, 46)

This indeed was one of the points raised in opposition to the GAO being named in the bill (See Statement of Charles Maechling, Jr., Representing the Radio-Electronics-Television Manufacturers Associa-

tion, *House Hearings* at 105; *supra,* p. 31) but only the least of many. Opponents of the bill, such as counsel for the Department of Defense, entertained no doubt about the real significance of naming the GAO in the proposed law. As noted previously (*supra,* pp. 29, 30) they opposed any bill specifically mentioning the GAO for the very reasons this case itself makes abundantly clear—finality of disputes decisions would be destroyed.

There can be no doubt about what the Department of Defense meant about superimposing the General Accounting Office on existing disputes procedures. Senator McCarran quite correctly stated the view of that department on the floor of the Senate: "This bill [S. 24, the pre-compromise bill which expressly named the GAO] has been held up, I am informed, at the request of the Air Force. The Air Force, I am further advised, objected to the fact that the bill gave the Comptroller General the same right that was given to a contractor to question a decision of a contracting officer . . . . " 99 Cong. Rec. 4598, (May 6, 1953).

The Department of Defense had made known its opposition to the bill in unmistakable terms and it was known also to Senator McCarran that passage of the objectionable bill would lead the Air Force to seek its veto. 99 Cong. Rec. 4598. Bearing in mind that the Department of Defense was then one of the few procuring agencies operating under a well-defined disputes board procedure, the Comptroller General could have been under no illusions regarding the scope and intent of Defense Department objections and his office is plainly wrong when it claims, as it does today, that opponents to naming the GAO in the bill were concerned simply with avoiding a grant of *binding* au-

thority to that office. The plain fact is that the Department of Defense did not want a bill that gave the GAO any authority over disputes procedures and that Department most certainly did not intend to endorse a bill that could later be construed as giving to the GAO the very authority which the Defense Department—and industry as well—saw so objectionable in the first instance.

True enough, the GAO can point to the fact that representatives of that office had testified during the hearings that enactment of either S. 24 (the version of that bill which specifically named the GAO) or the substitute bill (the compromise bill which deleted reference to the GAO) would allow that office its sought-after role in the disputes process (Statement and testimony of E. L. Fisher, General Counsel, General Accounting Office, *House Hearings* at 38, 39). The point seems persuasive—but only if one is willing to ignore the contrary statement, likewise made by representatives of the GAO during the hearings—that enactment of legislation that failed to mention that office would preclude the GAO from questioning decisions rendered pursuant to the disputes provision. (Statement of Frank L. Yates, Assistant Comptroller General of the United States, accompanied by E. L. Fisher, General Counsel and Charles Johnson, Legislative Attorney, General Accounting Office, *Senate Hearings* at 10, *supra*, p. 25) While the latter statement was made during the first Wunderlich hearings, i.e., the Senate hearings, the fact remains that the objections then raised by the GAO were directed against a bill (S. 2487) whose language was virtually the same as the later substitute bill (now the Wunderlich Act) and, as such, that bill, like the Wunderlich Act today, spoke only in terms of "judicial review".

Much too has been made of the fact that Congress relied upon assurances given it by the Comptroller General before passing the substitute bill (R. Brief of the United States General Accounting Office as Amicus Curiae in the Court of Claims at 43-45). But this fact can hardly serve to impress the Wunderlich Act with the meaning the Comptroller General would now ascribe to that law. Except for the conflicting testimony offered by the GAO concerning the significance of omitting any express reference to that office in the proposed legislation (mentioned above) the Comptroller General never ventured to say more of the substitute bill than that it would place his office "in precisely the same situation it was in before the decisions in the Wunderlich and Moorman cases." (*House Hearings* at 136)

Significantly, that pre-Wunderlich authority was never defined by Congress. The Attorney General has said on this same point that:

> Precisely what that independent authority was or should be was a controversial question, as to which Congress deliberately avoided making any decision in the Wunderlich Act. While the legislative history contains some conflicting statements, on balance it does indicate that Congress did not intend to set GAO up as an additional layer of administrative appeal for contractors on disputes clause questions. 42 Ops. Att'y Gen. No. 33 at 6 (1969)

That Congress may not have fully defined the Comptroller General's pre-Wunderlich role in disputes matters does not detract in any way from the only logical conclusion one can attribute to the resulting compromise that became the Wunderlich Act: taking the GAO

out of the bill (S. 24) meant taking the GAO out of the disputes process.

Clearly, this was the understanding of Congressman Willis—a member of the House Subcommittee before whom the final hearings were being held. When one of the witnesses raised the point that the Comptroller General might some day seek to rely upon the legislative history of the compromise bill to upset a Contracting Officer's decision for lack of substantial evidence (the witness had in mind the above-mentioned Comptroller General's statement about equal rights being given to the GAO under either S. 24 or the substitute bill), the Congressman questioned how this could be possible "when GAO has been left out deliberately [from the substitute bill] as compared to S. 24?" (Testimony of Franklin M. Schultz, Attorney at Law, Washington, D. C., *House Hearings* at 110) The witness saw this as a remote possibility; the Congressman saw it as an impossibility.

Nor does the House committee report that accompanied the substitute bill (H.R. Rep. No. 1380, 83d Cong., 2d Sess. (1954)) add any measure of support to the Court of Claims' interpretation of the Wunderlich Act.

That report makes evident what the legislative history itself confirms, namely, that the Wunderlich Act was intended neither to enlarge nor to detract from the powers of the GAO insofar as contracts and change orders were concerned. The report states, in relevant part, that:

> The specific intent of this legislation, insofar as it affects the General Accounting Office, is explicitly stated in the letter of December 30, 1953,

from the Comptroller General himself, in which he stated as follows:

> With respect to the second mentioned basis of opposition to the pending bills it should be pointed out that the General Accounting Office has not asked for authority which it did not have before the decision in the Wunderlich case. This was made clear in the testimony of representatives of this Office before the Senate subcommittee which held hearings on the somewhat similar bill, S. 2487. In this connection see the committee report on S. 24 (S. Rept. 32) wherein it is stated:
>
> "The committee wishes to point out with respect to the language contained in the bill, 'in the General Accounting Office or a court, having jurisdiction,' that it is not intended to narrow or restrict or change in any way the present jurisdiction of the General Accounting Office, either in the course of a settlement or upon audit; that the language in question is not intended either to change the jurisdiction of the General Accounting Office or to grant any new jurisdiction, but simply to recognize the jurisdiction which the General Accounting Office already has."
>
> That was and is precisely the position of the General Accounting Office. (H.R. Rep. No. 1380, 83d Cong., 2d Sess. 7 (1954))

Nothing contained in the report lends even remote support to the idea that the General Accounting Office was to be vested with any authority over disputes decisions. To overcome this, the GAO attempts to draw support from that language in the report which says that the General Accounting Office "as was its practice, in reviewing a contract and change orders for the purpose of payment, shall apply the standards of

review that are granted to the courts under this bill." H.R. Rep. No. 1380 at 7. Two things may be said of this statement. First, it is factually inaccurate. The GAO never reviewed change orders. Second, the statement on its face negates the very point which the GAO would seek to establish: contracts and change orders are not disputes decisions rendered by Boards of Contract Appeals. Nor are they the same as supplemental agreements which implement such decisions. It is not insignificant to note that the expansive interpretation given to this statement by the GAO was treated with silence by the majority below. The Report specifically states that there "is no intention of setting up the General Accounting Office as a 'court of claims'." (at 7)

Based upon all of the foregoing, it is submitted that the Wunderlich Act was intended to and has the legal effect of achieving two ends.

(1) The judicial review recognized in the first section of that Act (§ 321) was meant to restore to the contractor his right to seek court review of an adverse administrative disputes decision. It was never intended that that section's review standards should be invoked by the Government through the technique of forcing judicial review by withholding payment on a favorable disputes decision in cases where neither fraud nor overreaching were involved.

(2) The statutory prohibition placed against contracting agencies to conclusively determine questions of law, which is covered in the second section of the Wunderlich Act (§ 322), was intended to restore to the General Accounting Office its right to review the legality of contracts and payments under them and, as

such, relates to matters *other* than those inherent in the exercise of the quasi-judicial or discretionary fact-finding authority retained by the contracting agency through the disputes clause. In other words, § 322 precludes an executive agency from extending the disputes clause principle of finality against the Government to contract matters that are primarily non-factual in nature, an example being the question raised in *Morrison-Knudsen Co., Inc.* v. *United States,* 192 Ct. Cl. 410, 427 F.2d 1181 (1970) where the contractor's claim to an upward adjustment in contract price brought into issue the meaning and application, to social security taxes, of a contract clause providing for reimbursement of federal excise taxes. Resolution of this issue involved no threshold questions of disputed facts. However, where a legal question arises out of facts initially resolved under the disputes clause—the so-called mixed questions of fact and law that are posed by facts arising under the contract—this type of law question would fall beyond the reach of the GAO.[7]

This, we urge, is the only meaning that can and should be given to the Wunderlich Act. Any other interpretation would burden the Wunderlich Act with inconsistencies that neither its language, history, nor common sense could support. But, as matters now stand, there exists the anomalous situation whereby the GAO has been accorded a right to conduct *ex parte* reviews of disputes decisions rendered upon conclusion of adversary proceedings conducted at the appeals

[7] The statutory scheme envisaged in the Wunderlich Act—which we contend was to leave factual issues relevant to questions "arising under" the contract beyond the reach of the GAO—would be quickly eroded if the GAO were to be permitted to attack disputes determinations by recasting issues that are primarily factual in nature in the mold of "mixed questions of fact and law."

board level while disputes resolved at the subordinate Contracting Officer level remain beyond that office's reach. Yet, in each case, the dispute resolving authority being exercised by the Government stems from the same source—the agency head.

Further, the clear mandate by Congress that the GAO was not to become another Court of Claims—this the court below accommodated by saying simply that the Comptroller's powers lapse at the Court House door. But clearly, the *effect* of his powers do not. It is meaningless to draw a distinction between the GAO's reversing a disputes decision in favor of the contractor and the GAO's refusing to honor a payment that would implement such a decision. In either case, where the GAO's opposition to a disputes decision is based upon its own evaluation of the evidence, it has exercised a function totally judicial in nature—and one granted the contracting agency alone. And to the contractor, the effect in either case is the same. The decision below forces him to prove his case again.

II

NOTWITHSTANDING THE WUNDERLICH ACT, THE AUTHORITY OF EITHER THE COMPTROLLER GENERAL OR THE DEPARTMENT OF JUSTICE TO INTERVENE IN THE ADMINISTRATIVE DISPUTES PROCESS REQUIRES SPECIFIC STATUTORY AUTHORITY OR A RIGHT GIVEN BY CONTRACT. IN THE ABSENCE OF SUCH RIGHTS, THEIR INTERVENTION RESULTS IN A BREACH OF CONTRACT

The decision below rests upon two grounds. The first is that Congress intended the Wunderlich Act to open up a coextensive right of review of administrative disputes decisions for both the Government and its contractors. The second is that, because of the

Wunderlich Act, it no longer makes any difference how restrictive or limiting the language of a Government contract may be, that language can only be construed as if all applicable statutes are a part thereof. "The minimal bounds of judicial review", said the court below, "must be drawn from the terms, history, and policy of [the Wunderlich Act], not from policies speculatively drawn from the contract clauses which are themselves governed by the statute." (App. 49) In short, powers elsewhere reposed in the Government must be read into every disputes clause.

Our reasons for disagreeing with the Court of Claims' conclusion as to the *meaning* of the Wunderlich Act are set forth fully in the preceding section of this brief. In this section of the brief we take up what the court below saw as the necessary effect of that Act.

The disputes clause in Petitioner's contract (*supra*, p. 5, 6) provided that, in the case of any dispute concerning a question of fact arising under the contract which was not resolved by agreement, the same would be decided by the Contracting Officer and his decision, unless appealed by the contractor to the Commission (or its designated representative) within 30 days, would be final and conclusive. Further, the clause provided that the decision on the appeal would likewise be final and conclusive "unless determined by a court of competent jurisdiction"[8] to have been fraud-

[8] The Disputes Clause in Petitioner's contract is an adaptation of the form of that clause in use prior to the enactment of the Wunderlich Act (then referred to as General Provision 6) and was taken from the 1953 edition of the U.S. Standard Form 23-a construction contract. The Disputes Clause in current use (U.S. Standard Form 23-a, 1964 ed.) does not include the former lan-

ulent, capricious, arbitrary, so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence.

Nowhere in the language of this disputes clause or in any other language of the subject contract is

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guage "unless determined by a court of competent jurisdiction." The current ASPR clause reads as follows:

Disputes (June 1964)

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceedings under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law. (32 C.F.R. § 7.602-6 (1971); see also F.P.R., 41 C.F.R. § 1-16.401; § 1-16.901-23A (1971)

there a basis upon which to support the conclusion of the court below that a final disputes decision rendered at the agency head level could later be attacked by the GAO and the Department of Justice or be disavowed by the very agency that made the decision in the first place. However, since we see the problem of the agency's "disavowal" of its own decision as reaching issues distinct from those posed by the intervention of the GAO and the Department of Justice, we discuss that question in a later section of this brief. We concern ourselves here with that aspect of the Court of Claims' opinion which sanctioned the intervention of the GAO and the Department of Justice in a case where neither fraud nor overreaching was involved.

Neither the GAO nor the Department of Justice were parties to Petitioner's contract with the AEC. The Court of Claims thought this was irrelevant for the reason we have already noted: The Wunderlich Act demands that Governmental powers existing outside of the contracting agency, and not otherwise mentioned in a contract, may, nevertheless, be asserted by the Government and must be allowed to supersede those powers which the contracting parties had reserved to themselves.

The conclusion rests on two premises—each equally wrong. It assumes the existence of a power in the GAO and the Department of Justice which neither of those offices ever had. It negates the basic principles of contract law, and, as such, conflicts with the long held views of this Court on the same matter.

As noted in the first section of this brief, prior to the Wunderlich Act, the GAO never had authority, in the absence of fraud or overreaching, to go behind find-

ings of fact administratively resolved in other branches of the Executive Department and to needlessly (and wastefully) duplicate those efforts by recasting the facts according to its views of a matter. Nor was there any like authority inhering in the Department of Justice. That Department's claim to such authority in this case was based upon 28 U.S.C. § 516; § 519 (*supra*, p. 5) but as Judge Skelton correctly pointed out in his dissenting opinion: "These statutes in no way authorize [the Justice Department] to review and overrule what another executive agency has already decided on matters peculiarly within its jurisdiction and substitute [its] own opinion and decision therefor." (App. 73) We are in complete agreement with these views.

These considerations notwithstanding, and despite the fact that the Wunderlich Act can in no sense be considered a jurisdiction-granting statute (it added no powers to either the GAO or the Department of Justice), the court below implicitly assumed that each of these two Governmental arms was acting within its proper sphere when each separately sought to superimpose its judgment upon that of the administrative head that had decided in favor of Petitioner's disputes clause claims. The court made an assumption that was incorrect.

Furthermore, even if one could conclude that the GAO and the Department of Justice each had (or have) the inherent power to question contract disputes determinations on broader grounds than fraud or overreaching, still, it does not follow that the Wunderlich Act would now permit that authority to be exercised.

The view of the Court of Claims that disputes clauses must be read in light of other applicable statutes is not

a new one. Indeed, it was this very idea—that the powers of the Comptroller General's Office should supersede those of other executive officers and thus allow him to go behind findings that they had made—that was raised and rejected in *United States* v. *Mason & Hanger Co.*, 260 U.S. 323 (1922).

The question in that case was whether the Comptroller of the Treasury (predecessor to the Comptroller General) could offset, from money otherwise due the contractor, the costs of a performance bond which had been allowed as a reimbursable expenditure under an earlier "cost-plus" contract. The payment sought to be recovered had been approved and made by a Contracting Officer whose authority and decision in the matter—according to the terms of the contract in question—was made final and binding upon both parties subject only to the contractor's right of appeal to the agency head.

The finality of the administrative determination was contested by the Government. In its brief to the Court in that case, the United States argued that "neither a contracting officer nor any other officer of the Government could deprive the Comptroller of the Treasury of his statutory power and duty to see that no money was paid from the Treasury except such as the United States was legally bound pay."[9] Also it was contended that no contract could lawfully be made which would have such an effect. This argument, in other words, was the same as the rationale used by the court below: Notwithstanding the specific and limiting language of the disputes clause it must be read (and modified) in

[9] Brief for United States, Petitioner, p. 17, No. 121, Oct. Term 1922, *United States* v. *Mason & Hanger Co.*, 260 U.S. 323 (1922).

light of statutory powers existing outside of those reposed in the contracting agency.

In *Mason & Hanger,* the Court rejected this argument. It said that the parties could contract to achieve finality and that, over " . . . . decisions, and settlements and payments [made] in consequence of them . . . the Comptroller of the Treasury has no power. They were the acts and duty of the officer in charge, in the expression of which there was no ambiguity, and were, therefore, conclusive in effect." 260 U.S. at 326.

There are two aspects of the *Mason & Hanger* decision that bear directly upon and, contradict, the Court of Claims' view of the effect of the Wunderlich Act. First is the principle that guided this Court in reaching its conclusion: The Court saw the issue purely as one of contract law. The Comptroller of the Treasury was without power in the matter simply because the contract reposed complete authority over the payment in the Contracting Officer alone. In upholding the finality, against the Government, of the decision made by one of the contract parties pursuant to a finality clause, the Court said: "This is extending the rule between private parties to the Government." 260 U.S. at 326.

The reasoning and the result underscore the view which this Court has so often declared, namely, that when the United States enters into a contract, it obtains rights and incurs responsibilities similar to those of the private parties to those contracts. *United States* v. *Standard Rice Co.,* 323 U.S. 106, 111 (1944); *Hollerbach* v. *United States,* 233 U.S. 165, 171 (1914). In

short, the Comptroller of the Treasury, not having been a party to the contract, was without voice in the matter.

The second aspect of the *Mason & Hanger* decision that is relevant here goes to the fact that, both in its creation and in its enforcement, the agency's contract (i.e., the finality clause) was fully consistent with law. Though this point is not apparent in *Mason & Hanger*, its essentiality to the holding of that case is made clear by what was later said in *United States* v. *Moorman*, 338 U.S. 457 (1950). In that case, the Court, by way of explaining the long line of decisions upholding contract decisions made pursuant to finality clauses, said: "Contractual provisions such as these have long been used by the Government. No Congressional enactment condemns their creation or enforcement." 338 U.S. at 460.

Taken together, these two considerations affirm the proposition that where a contract itself vests decision-making authority in a contracting agency, and where the exercise of such authority by the agency is not otherwise prohibited by statute, then the contract shall be treated like any other contract made between competent parties. It is a contract between two parties only. Those who would claim a voice in the matter must either be recognized to have that right in the contract itself or else they have no authority to speak. Such is the rule between private parties. *Martinsburg & Potomac R.R.* v. *March*, 114 U.S. 549 (1885).

Such also is the rule that has always prevailed in contracts with the Government. From the early decision in *United States* v. *Corliss Steam-Engine Co.*, 91 U.S. 321 (1876) to the recent decision in *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394 (1966), this Court has consistently viewed the rights

and obligations created under contracts with the Government as a matter to be defined in accordance with the parties' expressed intent. And, seen from this perspective, it mattered little whether the finality of a decision made under the contract was expressed in the form of a settlement as in *United States* v. *Corliss Steam-Engine Co., supra,* was based upon a Contracting Officer's determination rendered pursuant to a finality clause as in *Mason & Hanger Co., supra,* or derived from a Board determination under a disputes clause as in *United States* v. *Utah Constr. & Mining Co., supra.* In all these situations, the guiding principle was the same: So long as the power of decision being exercised by the contracting agency (whether through an agency head, a contracting officer, or a contract board) was not prohibited by or inconsistent with statute and so long as it accorded with the expressed intent of the parties, the decision so made was binding upon all.

Has the force and logic of this proposition been changed by the Wunderlich Act? Clearly not.

Today, of course, a contracting agency cannot contract to provide for finality on pure questions of law. Section 322 of the Wunderlich Act expressly prohibits this. But this case does not involve agency determinations on pure legal questions. All that we are concerned with here are agency determinations on disputed fact questions arising under the contract. And, as to such questions, it is still true—as it was when *Manson & Hanger* was decided—that over such matters the parties may contract to achieve finality. The *only* change made by the Wunderlich Act on such questions is that where an agency decision on disputed facts has been otherwise *properly brought before a court by*

either of the contracting parties,[10] that decision may be reviewed under broader standards than those which prevailed at the time *Mason & Hanger* was decided. But does it follow from this, that because there now exists a broader basis for review, as between the contracting parties, that the way is thereby opened for others—not parties to the contract—to intercede and claim for themselves the right to decide anew factual aspects of a contract dispute which the procuring agency alone retained the contract right to judge and decide? The idea flouts the rule of contract law that this Court has *always* adhered to: " . . . a respect for the parties' rights to contract and to provide for their own remedies." *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966).[11]

To now allow the United States as a contract party to speak with three voices—all at cross purposes—is to negate the long held view that when the sovereign

[10] Even though § 321 of the Wunderlich Act was intended only for the benefit of contractors and was drafted in terms of the then existing Disputes clause, we do not question the fact that a contracting agency might avail itself of the review standards of that Act in order to secure a review of a decision of its Appeals Board in cases where it has properly reserved that right by appropriate contract language and by necessary changes in its applicable procurement regulations including provision for adequate procedural safeguards to protect against *ex parte* challenges. Whether such a "self-directed" review—which could only lead to protracted litigation—would be wise procurement policy is, of course, another matter. But in this case there was neither such a reservation nor even an attempt by the agency to seek review of its own decision.

[11] The cases in point are legion. Citations may be found in the following pertinent decisions: *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966); *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709, 713 (1963); *United States* v. *Wunderlich*, 342 U.S. 98, 100 (1951) and *United States* v. *Moorman*, 338 U.S. 457, 460 (1950).

contracts it becomes bound by the same general principles of contract that govern the relationship between private parties.

The Wunderlich Act was never intended to, nor does it accomplish, such a sweeping result. We submit that § 321 of the Wunderlich Act is in full harmony with the primary principle of this Court's decisions on finality of administrative decisions made under Government contracts. That principle is that, so long as the power of decision being exercised by the contracting agency is not prohibited by or inconsistent with statute (the "facts" disputes clause is not inconsistent with § 321 of the Wunderlich Act) and so long as the exercise of such power is in accord with the expressed intent of the parties (the disputes clause accomplishes this) then the decision so made is not open for reexamination by others.[12]

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[12] When the force of this principle is ignored, as it was in this case, then nonexistent distinctions have to be drawn in order to reconcile the complete finality (including immunity from collateral attack) that is accorded to "disputes"[2] resolutions that take the form of a contract settlement or an unappealed contracting officer decision and the lack of virtually any finality that has been accorded to contract board decisions by the opinion below.

Thus, contract compromises or settlements are viewed as binding upon all because they are consistent with the contracting agency's authority and because they accord with the parties' expressed intent. See, *Cannon Constr. Co.* v. *United States*, 162 Ct. Cl. 94, 319 F. 2d 173 (1963). On the other hand, the binding effect, against the Government, of a contracting officer's decision under the disputes clause (that clause only permits a contractor appeal, it omits a corresponding right on the part of the Government) is rationalized by the Court of Claims as simply a provision that outlines the appellate procedures to be followed within the agency. See, *C. J. Langenfelder & Son, Inc.* v. *United States*, 169 Ct. Cl. 465, 477, n. 7, 341 F. 2d 600, 607, n. 7 (1965). However, as to board determinations on disputes arising under the contract, these

We think this harmony between the legal principle and the Wunderlich Act is *intentional*. We mean, in other words, that it was precisely this view of the law that guided the drafters of the Wunderlich Act. By prohibiting contracting agencies from extending the disputes clause principle of finality to include pure questions of law, the way was left open for the GAO to assert its authority over contract payments. At the same time, however, taking the GAO out of the first section of the Wunderlich Act was meant to insure that the contracting agencies could continue to fully and finally resolve the factual aspects of disputed matters arising under the contract free from any Governmental second guessing.

The opinion below dealt to a great extent with the question of what the Wunderlich Act was intended to accomplish. We agree that this must be the point of initial inquiry. But the analysis of the problem cannot stop at that point. There remains to be decided whether the Act was sufficient to accomplish the purpose that the Court of Claims sees in that statute. And the answer is no.

Even if one could read the Wunderlich history to support the conclusion that the GAO was meant to have a role in the fact resolution process (in cases other than fraud or overreaching) the Wunderlich Act is clearly inadequate to accomplish that purpose. The history of contract decisions in this Court make plain

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become "fair game", open to challenge by all under the holding in this case. Obviously, all these methods of resolving contract disagreements are simply various aspects of one ultimate fact: the agency's right, as a contracting party, to fully and finally settle questions arising under its contract. There is no logic to the various distinctions the Court of Claims indulges in.

the fact that where the decision-making power of an agency is not barred by statute and where, by contract, that power is reserved for exercise by the agency alone, it is not open for others to intercede and claim a superior right. Section 321 of the Wunderlich Act does not prohibit the contracting agencies from writing "fact" disputes clauses into their contracts; hence the Act does not, and cannot, overcome the powers of those agencies to make final determinations. Respect for the integrity of contract is *the* controlling principle; not policies speculatively drawn from the Wunderlich Act.

The only "logic" that can be offered to support the decision below is that asserted by the Comptroller General himself in this case, namely, that his office is vested with authority to speak on disputes matters in the same manner as the courts and exercisable, at his own option, in every instance where a court itself might declare the rights of the parties on a matter which they have properly brought before it. 46 Decs. Comp. Gen. 441, 454-55 (1966).

We know of no decision of this Court that supports the Comptroller General in this unique view of the powers of his office. Nor do we know of any statute that grants this right. The Comptroller General has no more power today than when *Mason & Hanger* was decided and all that Section 321 of the Wunderlich Act could possibly be taken to support is the right of both *contracting* parties to seek review of a disputes decision. That Act speaks only in terms of *judicial review*; it makes no mention of the GAO. It hardly need be added that no more could be said in support of the intervention of the Department of Justice in

this case than was said in behalf of the GAO. Neither were parties to Petitioner's contract with the AEC.

The decision below offers no acceptable basis for rejecting the long held view that a contract is a contract.

This is not to say that the United States is always bound by the letter of its contract. Limitations on the enforceability of contracts as written (and payments made under them) must and do exist in order to secure for the United States the protection of its role as a sovereign. But those limitations are not involved here.

We are not concerned in this case with questions of fraud or overreaching. Similarly, we are not concerned here with the common law right of the United States to recover public money erroneously, wrongfully or illegally paid (or to refuse to make a payment which could be so regarded). That right—which exists independent of statute, *United States* v. *Bank of the Metropolis,* 40 U.S. (15 Pet.) 377, 401 (1841), and which is assertable either by way of an affirmative action or by counterclaim—applies to situations where payments have been made pursuant to an erroneous conclusion in the construction or application of a statute, and hence, in violation of legal authority, *Wisconsin Central R.R.* v. *United States,* 164 U.S. 190 (1896), or where the payment reflects an error of law or fact plain on its face. *J. W. Bateson Co.* v. *United States,* 308 F.2d 510 (5th Cir. 1962). It is a doctrine based upon considerations of justice and fairness and it has absolutely no application to situations where the matter of entitlement to payment on a claim is established upon the resolution of con-

flicting facts heard and decided in a fair adversary proceeding. Indeed, if this doctrine ever had the reach which is claimed for it today (see Brief for The United States in Opposition to S&E Petition for Writ of Certiorari, at 8) there would hardly have been a need for the Government to seek protection, by way of the Wunderlich Act, against binding contract determinations on questions of law such as that involved in *Mason & Hanger.*

Nor does this case involve a contract made in violation of the authorizing statute, which was the situation in *Federal Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380 (1947), or one that disregards mandatory procurement regulations as was the case in *G. L. Christian & Associates* v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418, *rehearing denied,* 160 Ct.Cl. 58, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963). All that is involved here is an administrative disputes determination made in a contractor's favor, in full accordance with law and applicable regulations, which first the Comptroller General and now the Department of Justice say should have been decided otherwise because they would have weighed and resolved the facts differently from the agency representative who heard and decided the case. Neither of these Government arms had either the inherent power or the contract right to bar the contracting agency from honoring the word of its contract.

III

APPLICABLE PROCUREMENT REGULATIONS CONTRADICT THE COURT'S CONCLUSION THAT THE HEADS OF CONTRACTING AGENCIES MAY DISREGARD THE FINAL DECISIONS OF THEIR CONTRACT APPEAL BOARDS

The court below held that even though a contracting agency may initially have decided a disputes appeal in a contractor's favor, nonetheless, it would still be open for the deciding agency to disavow its own decision and withhold payment—have "a change of heart", as the court put it—and thereby force the contractor to relitigate his claim in court. (App. 49)

In reaching this conclusion the court rejected the view held by its trial commissioner that there existed an identity between the contract appeals boards and the directing heads of the agencies which make the contracts. It said:

> We think the Wunderlich Act and the Supreme Court decisions interpreting it, in attributing finality to the extent they do to decisions of these Boards, necessarily imply an expectation that the Boards, while in the nature of things not as independent as Article III courts, will enjoy a degree of independence approaching and comparable to that of the various independent quasi-judicial and regulatory boards and commissions which, too, can make binding fact findings. (App. 58)

And, "having achieved this", said the court, "it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same." (App. 58)

Insofar as the procedural aspects of this case were concerned, the court conceded that, while the differ-

entiation between agency head and contract arbiter was an imperfect one here, (because no board proceeding was involved)[13] nevertheless, since the hearing examiner who had initially decided Petitioner's claims "had no management functions" (App. 57), the court saw no reason why different "legal consequences should flow from the distinction." (App. 60) Thus, Petitioner's case was made to fit within the court's new rule allowing agency heads to "appeal" decisions of their authorized hearing representatives (the contract boards) by withholding payments ordered under final disputes decisions.

The argument in this section of the brief is directed chiefly against the broad rule, announced in the opinion below, that agency heads may disavow their contractual commitments and be held harmless, by the Wunderlich Act, from the usual consequences that attend all breaches of promissory representations. However, before discussing the points of law involved, and why we believe that rule to be wrong, there should be noted first that the facts of this case simply do not support the application of the rule in the first instance.

That there was an initial decision by a hearing examiner and that he held no management functions is not in dispute. If the hearing examiner's decision on Petitioner's disputes claims was the *only* decision involved on those claims we would need only to argue

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[13] At the time this case was tried (1962), the then existing AEC contract disputes procedures provided that a hearing examiner, instead of a contract appeals board, should hear grievances arising under the disputes provision and render decisions thereon. These procedures, which were set forth in 10 C.F.R. 2.1 *et seq.* (1962), are now obsolete. An Atomic Energy Commission Board of Contract Appeals was established in 1964 (10 C.F.R. 3.1 *et seq.*).

against the correctness of the court's rule and not its application in this particular factual context. But this case did not involve *only* a hearing examiner's decision. Rather, it involved an initial decision of a hearing examiner followed by a later review and decision by the full five-member Commission itself—the head of the agency.

The procedural facts of the case (*supra,* p. 9; App. 1) which are in no way in dispute, show plainly that the Contracting Officer sought, and was granted, an appeal from the hearing examiner's decision which appeal was heard and decided by the Atomic Energy Commissioners.

Although the Commission's review on appeal did not include all the claims which the Contracting Officer had sought to have reexamined, it is clear from the order allowing the appeal that the Commission had considered (and rejected as inadequate) all of the Contracting Officer's arguments in support of a more extensive appeal. (R. Memorandum and Order, November 14, 1963, Atomic Energy Commission, p. 13; 2 AEC Rep. 738, 744)

The proceedings before the Commission resulted in a decision which modified the hearing examiner's one-one claim, reversed him on another and affirmed his decision on the remaining six claims. Thereupon, the matter was remanded to the Contracting Officer with instructions directing him to "diligently" proceed to a final settlement of Petitioner's claims in accordance with the hearing examiner's decision as modified by the Commission's own decision. (R. Decision, Atomic Energy Commission, May 13, 1964; App. 2; 2 AEC Rep. 850, 856) From that date forward, there has

never been a change of position by the AEC on the question of Petitioner's entitlement to payment in accordance with the directions of its own order.

We have raised this factual aspect of the case only to show that the rule laid down by the court below—that agency heads may disavow the decisions of their contract appeal boards (or other authorized delegees appointed to resolve disputes)—simply does not fit into the facts of this case. The claim determinations that are here in issue are those of the agency head—not those of its authorized representative. And those determinations have never been disavowed by the deciding agency. In short, there was no "change of heart". Thus, if the decision below is to stand, it must do so on the grounds that, either the GAO or the Department of Justice had a right, in and of themselves, to contest the finality of the administrative decision.[14]

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[14] This factual aspect of the case also brings into focus the role of the Department of Justice in this proceeding. Throughout this brief as well as in our Petition for Certiorari, we have taken the position that, properly interpreted, the decision below grants to the Department of Justice standing to contest an administrative disputes decision independent from that which it might derive through its role as a legal representative of the GAO or the AEC. This too was the view taken by the dissenters below. And it is on this ground—the role of the Department of Justice as a super-reviewing agency—that we saw the need to include the Department of Justice within the framework of the arguments raised herein. The confusion on the point, if there is any, is due, in part, to the fact that the opinion below never quite made clear what was intended by the statement that the Department's "decision to defend [against this suit] was not prompted by any sort of requirement to give mandatory defense to opinions of the Comptroller General, but rather it was the uninfluenced product of the Justice Department's *own* thorough and independent review of the case." (Emphasis added) (App. 48)

Nor can this ambiguous point be clarified in terms of the Justice Department's arguments on the case. Before the Court of Claims

The decision cannot be made to rest on the theory that the contracting agency repudiated its own decision because, as Judge Skelton quite forcefully points out in his dissenting opinion, that simply did not happen. (App. 61)

Turning now to the broader aspects of the problem, our argument against permitting agency heads to disavow decisions of their authorized contract appeal boards goes to one point only: Regulations currently governing disputes procedures of the Armed Services Board of Contract Appeals and the General Services Administration Board of Contract Appeals (the two contract appeal boards discussed in the opinion below, App. 57) are completely at odds with the court's position. These regulations do establish exactly what the trial commissioner had taken as his premise, namely,

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the Department of Justice took the position that the GAO's authority was "totally irrelevant to any issue in the . . . case" (R. Defendant's Request For Review of the Commissioner's Recommended Opinion at 4, 5) and the Comptroller General's intervention was simply the occasion but not the cause of the litigation (*Id.* at 6, n. 1) At the same time, however, it contended that, "To our knowledge . . . the Commission has not repudiated the decisions involved in this matter . . . ." (*Id.* at 14, n. 4) This suggests to us, as it did to the dissenters below, that the Justice Department saw itself rising above any limitations on its power that might flow from a want of authority in those who had precipitated the suit (i.e., the GAO). Today, however, the Department seems to see itself back in its more usual role as an advocate urging the cause of its client—the agency. While apparently agreeing with our views regarding the GAO, namely that Congress *did refuse to provide for GAO review of disputes clause decisions* (Brief for the United States in Opposition to S&E's Petition for Certiorari at 7, n. 5), the Justice Department now claims that the agency *did* disavow its earlier ruling, and that it was this disavowal by the agency that precipitated the proceedings below. (Brief for the United States in Opposition to S&E's Petition for Certiorari at 3, n. 2)

that, for purposes of measuring the finality of a disputes determination at the agency level, there *is* a legal identity between the arbiter of the contract dispute and the agency head who makes the contract.

In the case of the Armed Services Board of Contract Appeals, for example, its delegated adjudicatory functions vest it with authority to decide disputes clause appeals as "fully and finally" as might each of the several Secretaries of the Armed Services, 32 C.F.R. § 30.1 (1971) and, by regulation, its decisions are deemed to "constitute decisions of the Head of the Department as referenced in the Disputes clause standard in all Government contracts." 32 C.F.R. § 1.314(g) (1971). Nothing in the Armed Services Procurement Regulations supports the conclusion reached by the court below that, despite an all inclusive grant of authority to the contract appeals board, the head of a department has nonetheless reserved to himself the right to diminish the finality of a disputes determination by claiming that that determination was not meant to be his own.

The point is seen even more clearly in the Federal Procurement Regulations applicable to the General Services Board of Contract Appeals (GSBCA). The regulations defining this body's delegated authority state expressly that, *except* in those situations where the Administrator has reserved the right to personally decide a matter and thus, to direct that the authority of the board not be exercised, "The Board has authority to determine appeals falling within the scope of its jurisdiction as fully and finally as might the Administrator himself." 41 C.F.R. § 5-60.101(a); (b) (1971). Here, as in the case of the ASPR's, the contract appeals board speaks for, and in behalf of,

the agency head—*and with finality*—in all contract disputes matters save those which the agency head has expressly reserved for his own determination.

The coalescence between agency head and contract appeals board that is evident in the regulations delegating authority to the ASBCA and the GSBCA is not restricted to those particular contract boards alone. Nor is the principle of administrative finality on a disputes determination a characteristic exclusive to those boards. Rather, both of these considerations—identity and finality—frame the operative principle underlying virtually all Government contract appeals boards set up to hear contractor grievances brought under a disputes clause.[15]

When viewed against this well-defined administrative background, the holding below cannot stand. What the Court of Claims is, in effect, saying is that even though agency heads have issued regulations making their contract appeals boards the *final and exclusive* arbiters

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[15] See, as examples, Atomic Energy Board of Contract Appeals—"Decisions of the Board are final decisions of the Commission." 10 C.F.R. § 3.100(a) (1971); Department of Agriculture Board of Contract Appeals—"The decisions of the Board on all matters falling within its jurisdiction shall constitute the final administrative determination within the U.S. Department of Agriculture." 7 C.F.R. § 2400.3(d) (1970); Department of Transportation Contract Appeals Board—"The Board acts for the Secretary in hearing and deciding . . . appeals by contractors . . . ." 41 C.F.R. § 12-60.103 (1970); Corps of Engineers Board of Contract Appeals—"The Board is the authorized representative of the Chief of Engineers for the purpose of hearing, considering, and determining, as fully and finally as he might, appeals by contractors from decisions of contracting officers . . . ." 33 C.F.R. § 210.5(a) (1971); Veterans Administration Contract Appeals Board—"The Board is delegated authority . . . to render and publish final decisions on appeals entered by contractors . . . ." 38 C.F.R. § 1.771(a) (1970).

on disputed contract claims, (and, by so doing, have encouraged reliance upon their decisions by contractors, banks and sureties) nevertheless, the agency head may still refuse to honor such a decision when, in his judgment, the matter should have been decided otherwise. It was precisely this sort of administrative disregard of rights established by promulgated regulations that was condemned by this Court in *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959).

The question raised in that case was whether the Government could lawfully effect the summary dismissal of an employee in the face of a departmental order that promised greater procedural safeguards. The contention was made that, since the procedural safeguards were merely an act of administrative grace not otherwise dictated by statute, it was therefore open for the executive department to invoke its power of summary termination and dismiss without giving reason. The Court rejected this position, saying, that where the Secretary had chosen to proceed on security grounds he "was bound by the regulations which he himself had promulgated for dealing with such cases even though without such regulations he could have discharged petitioner summarily." 359 U.S. at 540.

The case here, though it deals with contract rights rather than procedural rights, is quite the same. The contracting agencies, as we earlier pointed out (*supra,* p. 58, n. 10) may, by proper changes in contract language and regulation, avail themselves of the judicial review standards set forth in the Wunderlich Act (§ 321), even though (as we claim) that section was intended only for the benefit of aggrieved contractors. But the point is that the contracting agencies have *not* sought to destroy the finality promised under their

disputes decisions. Instead, by their present regulations, they have fully committed themselves to the legal position that when the contract appeals board speaks, the agency head speaks too and the decision of the former is binding upon the Government.[16] Present procurement regulations—which have been accorded the force and effect of law, *G. L. Christian & Associates* v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418, *rehearing denied,* 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied,* 375 U.S. 954 (1963), leave no room for an agency head to disavow the determination of his cognizant contract appeals board.

This view of the matter demonstrates the error in the Court of Claims' position that, because of the "independence" of the contract appeal boards "it would be inconsistent and unfair for the law to turn around and pretend that the Board and the Secretary were the same." (App. 58) Assuming that the law should look beyond the fact that the members of the contract boards hold their office at the pleasure of the head of the agency, still, whatever independence the contract boards might be seen to have achieved under these circumstances can only be taken as a policy argument in support of a future change in procurement regulations. But it can hardly be taken as a basis upon which to disregard present regulations.

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[16] There is one exception to this statement and this exception strongly bears out our point both as to the future availability of the Wunderlich Act for "agency" review of disputes decisions as well as the present finality of disputes decisions against the Government. On March 17, 1971, the Department of Transportation published notice of a proposed change in its procurement regulations that would permit review of Contract Appeals Board decisions adverse to that Department in order to determine whether such decisions should be treated as final. Proposed Dep't Transp. Reg. § 12-1.318-53, 36 Fed. Reg. 5058 (1971).

CONCLUSION

In *United States* v. *Anthony Grace & Sons, Inc.*, 384 U.S. 424, 429 (1966), this Court said:

> ". . . Pre-eminently, this policy [of utilization of the administrative procedures contractually bargained for] is grounded on a respect for the parties' rights to contract and to provide for their own remedies. See *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 16 L.Ed. 2d 642, 86 S. Ct. 1545; *United States* v. *Moorman, supra,* 338 U.S. at 461-462, 94 L.Ed. at 259, 260. But, beyond that, there is also a belief that resort to administrative procedures is an expeditious way to settle disputes, conducive of speed and economy. *United States* v. *Blair, supra,* 321 U.S. at 735, 88 L.Ed. at 1043. Such procedures also facilitate a department's supervisory control over contracting officers and perhaps enhance the possibility of harmonious agreement."

We ask the Court to reaffirm these principles by overturning the interpretation that the court below has given to the Wunderlich Act. Only by so doing can there be avoided further inter-Governmental conflict and the disastrous impact on Federal contractors of the sort that occurred in this case where disputes clause determinations in favor of a contractor have been marred by burdensome litigation and have remained unpaid for nearly a decade.

There was a full and fair adversary proceeding held on the claims in issue and the contracting agency accepted the result of that proceeding. *Ex parte* reconsideration of the administrative determination by others can secure the Government no meaningful added protection. It is a policy of waste and never-ending litigation.

Indeed, if the Government wants to rewrite procedures and set up appellate rights with appropriate indemnifications and safeguards in the future, it has the power to do so. But in this case, it is bound by its contract. It has breached that contract and the Court is asked to so hold, to remand the case to the Court of Claims and direct it to grant Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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